reasonably practicable to return it to that person, shall be disposed of in accordance with the law regulating the disposal of lost or unclaimed property in the hands of police authorities."

In my view the intention of the legislature in enacting section 15(4)(b) of the Copyright Act is that after the infringing copies are seized by the police under a search warrant issued by a magistrate proceedings for any offence under section 15(1) must be instituted within six months of the seizure. If no proceedings are instituted within the six months the copies have to be returned to the person from whom they were seized or be dealt with in accordance with the provisions of section 15(4) of the Copyright Act.

The second prosecution in this case cannot be a continuation of the first one. The proceedings which were instituted within six months of the seizure of the tapes terminated on September 14, 1982 when the accused was discharged. Those proceedings were thereafter dead and gone to all intents and purposes. The order of discharge of the accused by itself was no bar to the institution of further proceedings against the accused but any further proceedings had to be instituted within six months of the seizure of the tapes and these six months had already lapsed when the accused was arrested the second time. And as the second proceedings were not instituted within the aforesaid six months the magistrate's court had no jurisdiction to take cognizance of the offences with which the accused was charged on this second occasion. The ruling by the learned magistrate was not a ruling on mere procedure from which there could be no right of appeal. The ruling went to the very jurisdiction of the magistrate's court and as such an appeal was quite in order. In the exercise of the appellate jurisdiction as well as the revisionary powers of the High Court I ordered that the accused be acquitted and discharged and that the video tapes be returned to him.

Order accordingly.

Solicitors: *Asbir, Hira Singh & Co.*

OVERSEA-CHINESE BANKING CORPORATION LTD. v. NATIONAL UNION OF BANK EMPLOYEES & ORS.

[O.C.J. (Wan Hamzah J.) May 11, 1984]

[Kuala Lumpur – Originating Motion, No A16 of 1984]

Administrative Law – Reference of dispute by Minister of Labour to Industrial Court – Application for leave to apply for order of certiorari to quash order of reference of Minister – Application for leave to apply for order of prohibition to prohibit Industrial Court from hearing dispute – Applications unnecessary and premature – Industrial Relations Act, 1967, s. 26(2).

Industrial Law – Transfer of bank officer – Whether dispute between Bank and Union over transfer a trade dispute – Reference of dispute by Minister to Industrial Court – Applications for leave to issue orders of certiorari and prohibition – Applications unnecessary and premature – Industrial Relations Act, 1967, s. 26(2).

In this case an employee of the applicant-bank was transferred from the Accounts Section of the bank to the Credit/Administration Department in the same office after an inquiry into certain discrepancies in the books maintained by him. The Union (1st respondent) protested against the transfer and asked the bank to rescind it. The dispute was eventually submitted to the Minister of Labour who referred the dispute to the Industrial Court. The applicant being advised that the dispute was not a trade dispute applied

(a) for leave to apply for an order of *certiorari* to remove into the Court for the purpose of it being quashed the order of reference of the Minister on the ground that the Minister had acted without jurisdiction, and

(b) for leave to apply for an order of prohibition to prohibit the Industrial Court from proceeding to hear and determine the dispute on the ground that the Industrial Court had no jurisdiction to do so.

Held: the application should be dismissed on the ground that prayer (a) was unnecessary and prayer (b) was premature, and on the ground that to entertain the application would encourage duplicity of proceedings. The applicant should have raised the question that the dispute was not a trade dispute before the Industrial Court. If after hearing the question the Industrial Court were to dismiss the objection, that would be the right time for the applicant to apply for an order of prohibition.

Case referred to:-

(1) *Assunta Hospital* v. *Dr. A. Dutt* [1981] 1 M.L.J. 115.

ORIGINATING MOTION.

C.V. Das (*M. Nagarajah* with him) for the applicant.

Mary Lim (Federal Counsel), for the 2nd and 3rd respondents.

Cur. Adv. Vult.

Wan Hamzah J.: Wong Lee Sim is an employee of the Oversea-Chinese Banking Corporation Limited (the applicant) and was working as a bookkeeper at the Kuala Lumpur Main Branch of the Bank. When carrying out yearly checks in December 1983 the internal audit team of the Bank discovered discrepancies in the books maintained by Wong Lee Sim. The Bank asked him to explain the discrepancies and he gave his explanation in writing. Subsequently the Bank gave him a letter asking him to attend an inquiry and by the same letter the Bank transferred him out of the Accounts Department to the Credit/Administration Department in the same office. As a result the National Union of Bank Employees (the first respondent) sent to the Bank a letter protesting against the transfer and asking the Bank to rescind it. The dispute between the Bank and the Union was eventually submitted to the Honourable the Minister of Labour (the second respondent). The Minister referred the dispute to the Industrial Court (the third respondent) for determination, purportedly under section 26(2) of the Industrial Relations Act.

The Bank has been advised by its solicitors that the dispute between the Bank on the one hand and Wong Lee Sim and the Union on the other over the transfer is not a trade dispute under the Act. Therefore by this Originating Motion the Bank asks this Court –

(a) for leave to apply for an order of *certiorari* to remove into this Court for the purpose of its being quashed the order of reference of the Minister on the ground that the Minister had acted without jurisdiction, and

(b) for leave to apply for an order of prohibition to prohibit the Industrial Court from proceeding to hear and determine the dispute on the ground that the Industrial Court has no jurisdiction to do so.

On behalf of the Bank it was submitted that the Minister's order of reference purports to confer on the Industrial Court jurisdiction to determine the dispute, and if the order of reference is not quashed the Industrial Court is bound to determine the dispute. It was further submitted that if the Industrial Court determines the dispute and gives a decision against the Bank, it would be too late for the Bank to apply to the High Court to quash the decision of the Industrial Court. So the Bank posed to this Court the question whether the dispute is a trade dispute.

In my judgment this application should be dismissed on the ground that prayer (a) is unnecessary and prayer (b) is premature, and on the ground that to entertain this application would encourage duplicity of proceedings. Instead of making this application the Bank should at the hearing before the Industrial Court raise the question that the dispute is not a trade dispute, and should persuade the Industrial Court not to consider and determine it on that ground. The Industrial Court is bound to hear and determine the question posed and the objection raised against the determination of the dispute. If the Industrial Court dismisses the objection, that would be the right time for the Bank to come to this Court to apply for an order of prohibition to prevent the Industrial Court from determining the dispute; or if the Industrial Court proceeds to determine the dispute and gives no chance to the Bank to apply for an order of prohibition, it would be open to the Bank to apply for an order of *certiorari* to quash the decision of the Industrial Court on the ground that the dispute is not a trade dispute and the Industrial Court has no jurisdiction to determine it.

In the Federal Court case of *Assunta Hospital* v. *Dr. A. Dutt*[1] the respondent claimed that he had been dismissed from employment by the appellant without just cause and excuse and eventually the matter was referred by the Minister to the Industrial Court. The appellant applied to the High Court for an order of prohibition to prevent the Chairman of the Industrial Court from hearing the case. One of the grounds of the application was that the respondent was not a workman under the Industrial Relations Act 1967. The High Court dismissed the application. The appellant appealed to the Federal Court and the Federal Court dismissed the appeal and upheld the decision of the High Court. The important point in that case was that if it was found that the respondent was not a workman, then the Industrial Court would not have jurisdiction to hear and determine the dispute. So, when the application for an order of prohibition was made the question was posed to the High Court whether the respondent was or was not a workman. The Federal Court was not concerned with what was the answer to the question posed, but the Federal Court left the matter to the Industrial Court to find the answer. The judgment of the

Federal Court, *inter alia*, reads –

"The question whether Dr. Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, is a mixed question of fact and law and clearly within the province of the Chairman (of the Industrial Court) to find in a reference to him of the workman's representations of dismissal without just cause or excuse ..... Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for mandamus ..... there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear the reference. In the exercise of its jurisdiction in a reference under section 20(3), *the court (i.e. the Industrial Court) has a duty to come to a first finding whether the claimant was or was not a workman* within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse ...."

I would like to stress on the words which I italicize "the court (*i.e.* the Industrial Court) had a duty to come to a first finding whether the claimant was or was not a workman", in order to show that the Industrial Court is not only competent but also bound to consider the very question posed to the High Court in that case and to make a finding and give an answer to it. Similarly in the present case the Industrial Court is competent to consider the question posed to this Court whether the dispute is a trade dispute and to give an answer to it. The fact that the reference in that case was made under section 20(3) and the reference in the present case was made purportedly under section 26(2) should not make any difference in the result.

It should be noted that the Federal Court was careful to use the words "jurisdiction to hear the case" and "jurisdiction to hear the reference" when referring to the jurisdiction which the Industrial Court was seized with. In the judgment of the Federal Court it is not mentioned that once reference is made by the Minister the Industrial Court is seized with power to determine the dispute. I believe the significance of this is that when the Industrial Court is seized with jurisdiction to hear the reference, it is competent to hear and determine a question which relates to its power to determine the dispute, for example the question of whether the respondent in that case was a workman, and if it was found by the Industrial Court that he was not a workman it should decide that it had no power to entertain the respondent's claim for reinstatement in employment. So in the present case the Industrial Court is seized with jurisdiction to hear and determine the question whether the dispute is a trade dispute. If it decides that the dispute is a trade dispute, the Industrial Court should then proceed to hear and determine it. If it finds that the dispute is not a trade dispute, the Industrial Court should report to the Minister that it has no power to determine it.

Since the Industrial Court is competent to decide on the question whether or not the dispute is a trade dispute, it is not necessary for the Applicant to apply to quash the Minister's reference. The submission that the dispute is not a trade dispute can be made on behalf of the Bank in the Industrial Court instead of in this Court. For this Court to entertain such an application would encourage duplicity of proceedings. I am aware of the following passage in the judgment of the Federal Court:-

"In the case under consideration we are not concerned with any question whether the Minister has or has not exercised his discretion correctly. If it should be such a case, the action is not to stop the Industrial Court from hearing the reference but by some application by which the order of reference can be impugned."

In that case there was no application for an order to set aside the Minister's reference, and therefore it cannot be expected that the Federal Court at the time of considering that case had in its mind all the pros and cons of granting such an order, *e.g.* the question of duplicity of proceedings. If the Federal Court had to consider the question relating to such order, it would no doubt take into consideration all relevant matters and would not favour duplicity of proceedings.

It is premature for the Bank to apply for an order to prohibit the Industrial Court from determining the dispute, because before proceeding to determine the dispute the Industrial Court should make the first finding whether the dispute is a trade dispute. In the event that the Industrial Court decided to proceed with the hearing of the dispute as a trade dispute, that would be the right time for the Bank to apply to this Court for an order of prohibition. To entertain the application for an order of prohibition at this stage would encourage duplicity of proceedings. The Bank should exhaust all efforts in the Industrial Court before coming to the High Court, in order to avoid duplicity of proceedings.

The application is dismissed.

It appears from the further affidavit filed on behalf of the applicant that the applicant and the

First respondent had appeared before the Industrial Court and the Industrial Court had fixed the case for mention pending the outcome of the present application in this Court. This judgment should serve as a direction to the Industrial Court to proceed to hear and determine the question whether the dispute is a trade dispute.

Application dismissed.

Solicitors: *Shook Lin & Bok.*

ABDUL RAHIM BIN SIAN v. MESDI BIN WARIAN

[O.C.J. (Shankar J.) September 18, 1984]
[Muar – Civil Suit No. 44 of 1977]

Damages – Quantum – Loss of sight of left eye – Plaintiff slashed by defendant – Award for exemplary damages given per incuriam – Categories for exemplary damages very narrow.

The plaintiff, an odd job labourer, was slashed by the defendant with a parang. He sustained serious injuries and lost sight of his left eye.

The defendant was charged with a criminal offence arising out of the said assault. He pleaded guilty and was imprisoned for 3½ years.

The plaintiff claimed that he earned an average of $300.00 per month. Since his employment was of a casual nature, the parties agreed that $150.00 per month would be a fair figure for the purpose of computing the sum to be awarded by way of loss of earnings and loss of earning capacity.

The severity of the attack which was unprovoked led the court to award exemplary damages for the sum of $15,000.00 following the case of *Loudon* v. *Ryder*[1] as authority for the proposition that this was a proper case in which exemplary damages should be awarded. However, on re-consideration,

Held: (1) the case of *Loudon* v. *Ryder*[1] was overruled by *Rookes* v. *Barnard*[2]. The categories in which exemplary damages may be awarded are very narrow. The present case was not within the permitted categories and the award of $15,000.00 for exemplary damages was clearly *per incuriam;*

(2) the court revised its order and ordered the defendant to pay the plaintiff the sum of $25,000.00 for general damages and $10,000.00 for special damages and for loss of future earnings and earning capacity. The plaintiff was also awarded $2,000.00 in costs inclusive of disbursements.

Cases referred to:

(1) *Loudon* v. *Ryder* [1953] 2 Q.B. 202; [1953] 1 All E.R. 74.
(2) *Rookes* v. *Barnard* [1964] A.C. 1129, 1229.

CIVIL SUIT.

C.K.G. Pillay for the plaintiff.
Pritam Singh Brrard for the defendant.

Cur. Adv. Vult.

Shankar J.: Abdul Rahim bin Sian, the Plaintiff in this case, was slashed by the Defendant, Mesdi bin Warian on April 4, 1973 at about 8.00 a.m. with a parang. He sustained serious injuries and lost the sight of his left eye.

When the case came on for hearing, the Defendant was absent. The Plaintiff's evidence as to what happened was unchallenged. It was to the following effect. On the day in question, the Plaintiff had gone to visit his friend Mastor bin Mesdi at his house. This Mastor was the son of the Defendant and a good friend of the Plaintiff. After the visit and when the Plaintiff was on his way out, the Defendant attacked him without any warning with a parang. He was slashed on the head. The scar was still visible and extended from just above the left temple and came diagonally across the left eye. The Plaintiff put up his right hand to ward off the blow and sustained injuries on his hand also. According to the Plaintiff there was no previous quarrel or misunderstanding between the parties and the assault was completely unprovoked.

In his evidence-in-chief the Plaintiff confirmed that all injuries and disabilities recited in the Statement of Claim were true. Without going into great detail, suffice it to say that the injury to the head cut through the skull into the brain. The left eye ball was split into 2 unequal portions. The severity of the attack was such that it is a credit to the doctors who attended to the Plaintiff that he is still alive.

The Defendant was charged with a criminal offence arising out of this assault. We are told that he pleaded guilty and was imprisoned for 3½ years.

At the time of this attack the Plaintiff was an odd-job labourer on pineapple plantations. He claims that he earned an average of $300.00 per month. Since his employment was of a casual nature, it was agreed between the parties during cross-examination that $150 per month would be a fair figure for the purpose of computing the sum to be awarded by way of loss of earnings and loss of earning capacity.

There were some small items of special damage